

Tiffany & Company and Local 1-J, Service Employees International Union, AFL-CIO. Case 22-CA-11812

26 January 1984

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER**

On 27 June 1983 Administrative Law Judge James F. Morton issued the attached decision. The General Counsel filed exceptions and a supporting brief, and Respondent filed cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions¹ and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

¹ In affirming the judge's recommendation that the complaint be dismissed in its entirety, Chairman Dotson and Member Hunter do not adopt all of his rationale.

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge: Upon a charge filed on August 18, 1982, and amended on October 6, 1982, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 22 issued a complaint against Tiffany & Company (Respondent) alleging that it violated Section 8(a)(1) and (5) of the National Labor Relations Act, as amended (the Act). Respondent filed an answer to that complaint. At the hearing held before me in Newark, New Jersey, on April 5 and 6, 1983, the General Counsel was permitted to amend the complaint to allege other violations of Section 8(a)(1) and (5) of the Act; Respondent's answer was correspondingly amended to place those allegations in issue in addition to those framed by the original pleadings.

Upon the entire record,¹ including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and by Respondent, I make the following

¹ The General Counsel's unopposed motion to correct the transcript dated May 10, 1983, is granted and received in evidence as G.C. Exh. 28.

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation of the State of New York engaged in retail sale at its stores in New York City and in other large cities. It also has a factory in Newark, New Jersey, the situs of the dispute in this case. Its operations easily meet the Board's standard for retail concerns.

Local 1-J, SEIU, AFL-CIO and its predecessor, Amalgamated Local Thirty Eight A, SEIU, AFL-CIO, have been labor organizations as defined in Section 2(5) of the Act.

II. THE ALLEGED VIOLATIONS

A. Background

Respondent has about 1500 employees nationwide, of whom only about 110 at its Newark facility have been represented for purposes of collective bargaining. The Charging Party in this case, now Local 1-J, represents a unit of approximately 90 production and maintenance employees there, but not the 20 employed in its engraving, printing, and stamping departments there. Those 20 employees are represented by Local 26, Engraving Trades Union.

The unit represented by Local 1-J has been in existence for many years. At one time Local 51, International Jewelry Workers Union represented that unit. In 1971, Local 51 was dissolved upon its merger with Local 38 of that International. In 1980, the IJWU merged with the Service Employees International Union; Local 38, IJWU then became Local 38A, SEIU. On June 13, 1980, Respondent and Local 38A had signed a collective-bargaining agreement retroactive to April 17, 1980, and to be effective until April 17, 1982. As discussed below, Local 38A later became part of Local 1-J, SEIU; Local 1-J then became the successor to Local 38A's contract with Respondent.

In April 1979, Avon Products Inc. acquired Respondent with the understanding that Respondent's chairman then, Walter Hoving, would retain control of Respondent's operations as long as he remained chairman. Hoving retired on December 31, 1980. The General Counsel asserts that, almost immediately thereafter, Respondent began and continued a campaign to undermine the incumbent union, Local 38A, Local 1-J's predecessor and that, in the period covered by Section 10(b) of the Act, Respondent has failed and refused to bargain collectively with Local 1-J. The pleadings in this case frame the issues discussed next.

B. Issues

The complaint originally alleged that Respondent had failed to bargain collectively with Local 1-J² by having, in renewal contract negotiations in 1982, remained "fixed in its position that it would not agree to any form of union security and by adamantly refusing to consider any

² Or, more exactly, with its predecessor Local 38A. The parties agreed that references to Local 38A pertain now to Local 1-J.

modified form of union security as proposed by (Local 1-J)." At the hearing, allegations were added that Respondent adamantly refused to consider any agreement providing for the checkoff of union dues and that Respondent unilaterally changed unit employees' wages and benefits. Those three allegations, of unlawful conduct (pertaining to the union shop clause and also the check-off clause and the alleged unilateral changes) were placed in issue by Respondent's answer, as amended.

There is virtually no material dispute as to the relevant facts.

C. The Alleged Indicia of Bad Faith Outside the 10(b) Period

The General Counsel adduced evidence to show that, within 2 months of Hoving's leaving as chairman of Respondent, officers appointed by Avon Products Inc. granted benefits to unit employees after having effectively presented Local 1-J with a fait accompli insofar as any meaningful negotiations were concerned. The General Counsel's witness testified that he received a letter dated February 5, 1981, from Respondent offering to put immediately into effect extensive improvements in the insurance and disability benefits programs of the employees in the Local 1-J unit. That letter requested Local 1-J to advise whether it had any objections. Local 1-J's representative testified that he could not object as the Union had unsuccessfully sought those very improvements in contract negotiations in preceding years.

Respondent thereupon adduced evidence as follows. In December 1980 (Hoving was to retire later that month), Respondent began to develop a revised benefits package for all of its 1500 employees nationwide. On February 2, 1981, it sent form letters to all its nonunion personnel notifying them of improvements. The unrepresented clerical employees at Respondent's Newark plant were among those notified. On February 5, 1981, Respondent wrote Local 1-J and offered to put those same benefits into effect immediately for the employees represented by Local 1-J. It appears that a similar offer was made to Local 26 respecting the engraving unit employees at Newark. Local 1-J informed Respondent that it was pleased with the new coverages. Upon receiving Local 1-J's consent, Respondent notified the employees Local 1-J represented of those additional benefits. A similar procedure was followed by Respondent in October 1981 when improved retirement benefits and a new dental plan were put in effect for all 1500 employees. Again, Local 1-J was asked if it had any objections and when Respondent was advised that Local 1-J's representative accepted those improvements, the unit employees at Newark were notified by Respondent of those new benefits.

I find it difficult to attribute bad faith to Respondent in its offers to Local 1-J to include the unit employees in the new benefits programs with its nonrepresented personnel. It seems unlikely to me that Respondent would contrive to grant substantial benefits to more than 1500 unrepresented employees in order to have the opportunity to bypass Local 1-J. Had it intended them to undermine Local 1-J, it might have sought to withhold those

new benefits from the employees represented by Local 1-J.

D. The 1982 Negotiations

On January 28, 1982, Local 38A (Local 1-J's predecessor) wrote Respondent that it desired to negotiate a contract to replace the one then scheduled to expire on April 17, 1982. Respondent wrote Local 38A on February 11 suggesting that the first negotiation session be held on February 17; it also notified Local 38A in that letter that the new agreement would not provide for retroactivity if negotiations were not concluded by April 17. In past negotiations, agreements had been reached after the old contracts expired and those renewal agreements provided for retroactivity. The General Counsel suggests that Respondent's statement of position, in its February 11, 1982, letter as to retroactivity is indicative of its overall bad faith. I can give little weight to that contention as it is undisputed that Respondent was in, and continued, the practice of paying the employees on Local 38A's negotiating team for the time they were engaged in negotiations in lieu of working and as Respondent was stating that it was pressing for an early agreement and as it was offering to meet promptly with Local 38A to that end.

Local 38A could not meet with Respondent until March 11. It presented its demands and received Respondent's. Respondent's first proposal carried a shock wave that reverberated throughout all the negotiation sessions and established the basis for the General Counsel's allegations in this case. Respondent proposed that the union-shop and checkoff provisions that had been in the Local 38A contracts and those of its predecessors for many, many years should be deleted and that the contract contain instead a statement that union membership and dues payments are matters of individual freedom and should not be conditions of employment. Local 38A's representative told Respondent's representative that, in years past, it had made concessions to obtain the union-shop and checkoff clauses and explained why it felt it was essential that those claims remain in the contract. Respondent's representative explained Respondent's position. Essentially it was, and has consistently been, that "the open shop [is] based upon [Respondent's] formally held philosophical belief that every individual should have a freedom of choice with respect to union membership." Respondent's view is that there can be either an open shop or a union shop and that there "is nothing really in between." As to the checkoff clause, Respondent advised Local 38A that its basic policy is to "maximize" the take-home pay of its employees and that it is opposed to making any deductions from gross wages which it is not legally bound to deduct.

Local 38A's representative thereupon stated that he could not sign any contract that did not contain provisions for a union shop and for the checking off of union dues.

The parties met again on March 15 and 19. At those sessions, Local 38A spent most of the time trying to get Respondent to abandon its position on an open shop clause and the elimination of the checkoff clause. Re-

spondent offered to provide Local 38A with a table in its cafeteria where it could collect dues. That offer was rejected. Local 38A left the third meeting in anger. No date was set for a fourth meeting. Respondent wrote the Union urging that negotiations be resumed.

After further correspondence and telephone discussions, the fourth meeting was held on April 7. In between the third and fourth sessions, Respondent had reached a renewal contract with Local 26 covering the 20 engravers. Incidentally, the Local 26 contracts never contained union-shop or checkoff provisions; Local 26 is composed of only those 20 employees and it appears that it is to their advantage to maintain a separate identity, by reason of their craft, for purposes of separate bargaining.

Local 38A merged into Local 1-J on April 1, 1982. Perhaps that had something to do with Local 38A's not having acceded to Respondent's request for an early fourth session. I note too that Respondent raised no objection to Local 1-J's successorship claim and instead honored it and met with its representative, as related next.

At the April 7 meeting, Respondent expanded on its initial economic proposals by offering a 9-percent increase, a 25-cent-an-hour increase in minimum and starting rates, and by agreeing to two of Local 1-J's demands respecting vacation pay. Local 1-J's principal negotiator was the same individual who had conducted Local 38A's negotiations. He ignored Respondent's economic proposals and asked if Respondent deducted moneys from employee wages for other purposes, such as for charities. Respondent replied that that practice had been discontinued. Respondent offered to make some arrangement whereby Local 1-J could collect its dues and told Local 1-J it would endeavor to make it as convenient as possible for that to be done. Local 1-J did not accept. The meeting ended with an agreement to meet again on April 12.

On April 12, Local 1-J demanded a 2-year contract and substantial wage increases. Respondent offered to modify its proposal for a 1-year contract term to a 2-year term with a wage reopener in the second year. It appears that the remainder of the meeting was then devoted to discussing Respondent's philosophy as to the union-shop and checkoff provisions. Respondent sought to schedule the next session for April 14 but Local 1-J advised that it could not meet until April 16.

On April 16, Local 1-J advised that while it would not agree with Respondent's putting a 9 percent wage increase into effect when the then existing contract expired, Local 1-J could not stop Respondent from doing that. There then was a discussion about insurance expenses; Local 1-J sought data and was given it. The discussion turned shortly afterwards to the union-shop and checkoff issues without progress thereon.

The next meeting was held on April 22. Respondent presented its "final" offer; therein it conceded to Local 1-J's demand as to retroactivity and made other concessions on wages and other economic matters. Its final offer revised its earlier proposal that affirmative open shop language be put in the contract; Respondent's final offer contemplated the removal of the union-shop and checkoff clauses. The discussion turned to the union-

shop and checkoff matters with predictable results. Afterwards, Respondent distributed to the unit employees copies of the offers it had made in that negotiation session.

Three subsequent meetings were held. At two of these, a state mediator was present. Negotiations at those three sessions bogged down in the disputes respecting the union-shop and checkoff clauses. On May 19, Respondent put its final offer (made on April 22) into effect. The General Counsel contends that the wage increases and other changes resulting therefrom constituted unlawful unilateral changes as the General Counsel asserts that the bargaining "deadlock" was the result of Respondent's bad faith and that it therefore was not a lawful impasse.

On August 13, Local 1-J sought a maintenance-of-membership clause. Respondent rejected it, asserting that such a clause was a form of union security. On September 29, Local 1-J modified that proposal but again Respondent rejected it as it was still a form of union security.

On October 29, Respondent offered to put a clause in the contract obligating it to notify Local 1-J within the first 30 days of a new employee's hiring date, of the name and address of that employee and obligating Respondent further to provide Local 1-J with a suitable place within its factory for the Union to recruit bargaining unit employees to membership. Local 1-J has ignored that offer.

E. Analysis

The General Counsel contends that the basic theory of his case is that, from Respondent's change in bargaining practices in 1981 and 1982 (including the modification in benefits in February and October 1981, the elimination of retroactivity at the outset of negotiations in 1982, and the insistence upon deletion of the union-security and check-off clauses) it must be inferred that Respondent engaged in bad-faith bargaining. Respondent's view is that no inference of bad faith on its part can be drawn from the totality of the evidence.

I observed earlier, respecting the midterm contract improvements in 1981, that they were done only after the assent of Local 38A was obtained and that it was improbable that Respondent would have drawn up those improvements to undermine Local 38A as it represented but 90 of about 1500 employees affected. More likely, the new management at Respondent sought, in 1981, to establish a favorable climate for its new management among all 1500 employees upon the retirement of its longtime chairman, Walter Hoving. The offers of increased benefits in 1981 cannot have been aimed at undermining the Union. The General Counsel maintains that the letters in 1981 were not offers but rather were given the Union as a fait accompli. It is easily inferred from the way Respondent presented those proposals that Respondent presumed the Union's ready acceptance of those proposals. That could show that Respondent may have had a disdain towards its obligation to deal with the Union but it cannot show that Respondent violated that obligation.

I see nothing upon which an inference of bad faith can be drawn from Respondent's position in February 1982 that the renewed agreement would not be retroactive if reached after April 17, 1982—particularly as Respondent later conceded to Local 1-J's demand for retroactivity. There remain the matters of the negotiations on the union-security clause and the dues-checkoff clause.

The General Counsel relies on two cases³ to support the allegation that Respondent's unlawful insistence on deleting the union-security provisions from the contract violated the Act. In the first cited case, the Board affirmed the holding that the employer's refusal to concede to a union-security proposal was unlawful as it was based on a "philosophical opposition" to any form of compulsion. In the second cited case, the Board observed that the totality of the evidence, including the specious reasons offered by the employer there for rejecting the union-security proposals, established bad-faith bargaining. In the instant case, there is no evidence that Respondent offered specious grounds or engaged in devious conduct to avoid agreement.

Respondent's witnesses testified that bargaining representatives had full authority to concede the union-security issue if that were the "best" strategy and that Respondent was "flexible" on that matter. There is no evidence however that Local 1-J had any indication from Respondent that Respondent's representative could accede to any form of union security. Rather, the evidence is clear that it was in effect informed that he could discuss, consider, review, analyze, rephrase comments, and offer alternatives to, any form of union security but the evidence is entirely clear too that Local 1-J was informed that there was no way that Respondent would ever agree to any form of union security.

The General Counsel had indicated that, at one point in the course of the 1982 negotiations, Respondent "conditioned further bargaining on Local 1-J's acceptance of an open shop and elimination of checkoff." It seems to me that observation was applicable for all of the sessions, insofar as Local 1-J could see. The General Counsel thus contends that the holding in *Preterm*, supra, supports a finding that Respondent's "philosophy and opposition" to any form of union security violated the Act. *Preterm* holds that such a view point constitutes evidence of a refusal to confer in good faith and the particular facts of that case reveal that *Preterm*'s concern was "disingenuous" and that *Preterm*'s total conduct in negotiations established that its purpose was to waste time in order to free itself of the need to bargain. The evidence in the instant case is insufficient to support a similar finding here.

The issue to be decided in this case has been framed by the Board⁴ as follows:

³ *Preterm, Inc.*, 240 NLRB 654, 673 (1979); *Queen Mary Restaurants Corp.*, 219 NLRB 776, 777 (1975).

⁴ *Church Point Wholesale Grocery Co.*, 215 NLRB 500 (1974).

Did the Respondent negotiate with the Union in bad faith with the intention of avoiding reaching agreement or conditioning acceptance of terms and conditions which the Respondent knew or should have known were unacceptable to any self-respecting union?

That issue was posed in a context similar to that of the instant case where Respondent entered negotiations with a view that it would "remain attached" to its philosophical opposition to any form of union security. Not only did Respondent discuss and consider all view points presented by Local 1-J as to the union-security issue, Respondent also offered alternatives and withdrew from its initial proposal that the contract contain an express open shop clause. That evidence, coupled with the overall evidence including the showing that Respondent pressed for an early agreement and offered substantial wage benefits and other concessions to induce agreement, compels me to follow clear Board precedent.⁵ Thus, I find that the General Counsel has not proved that Respondent engaged in bad-faith bargaining by its stated opposition to any form of union security. The same rationale applies to the allegation that Respondent's position vis-a-vis check-off of union dues constituted bad faith.⁶

Respecting the remaining allegations of the amended complaint, I find that an impasse had been reached at the time Respondent put into effect its final proposals. Thus, these contract changes were not unlawfully instituted.⁷

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 1-J is a labor organization as defined in Section 2(5) of the Act.

3. The evidence is insufficient to establish that Respondent violated Section 8(a)(1) and (5) as alleged in the complaint, as amended.

On the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended

ORDER⁸

The complaint is dismissed in its entirety.

⁵ *Deister Concentrator Co.*, 253 NLRB 358 (1980). See also *Roanoke Iron & Bridge Works, Inc.*, 160 NLRB 175, 180 (1966).

⁶ *Standard Trucking Co.*, 183 NLRB 564, 598 (1970).

⁷ *R. A. Hatch Co.*, 263 NLRB 1221 (1982).

⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.